Capital Punishment

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1. Definition and philosophical background

Capital punishment or death penalty is the execution of an offender sentenced to death after conviction by a court of law for a criminal offense. Capital punishment is distinguished from extrajudicial executions carried out without due process of law.

It is based on the principle of retributive justice. Supporters of the death penalty argue that death penalty is morally justified when applied in murder especially with aggravating elements such as for multiple homicide, child murderers, cop killers, torture murder and mass killing such as terrorism, massacre, or genocide. Some even argue that not applying death penalty in latter cases is patently unjust.

Capital punishment for murder, treason, arson, and rape was widely employed in ancient Greece. A basis can be found in religious teachings both for permitting and forbidding the death penalty. In the Christian World, the Biblical passage, “sheddeth man's blood, by man shall his blood be shed” has been cited as the justification for capital punishment.

Yet capital punishment has been prescribed for many crimes not involving loss of life, including adultery, blasphemy etc in Judaism, Christianity and Islam. Death was formerly the penalty for a large number of offenses in England during the 17th and 18th centuries, but it was never applied as widely as the law provided. In India, capital punishment has a very long history; Manusmriti prescribed execution by elephants for a number of offences including theft. In colonial India, death was prescribed as one of the punishments under the Indian Penal Code, 1860 and the same was retained after independence.

2. Status in Different Countries and International Position

In 1945, only eight nations had abolished the death penalty for all crimes then. In 1977, only 16 countries had abolished the death penalty for all crimes. As of December 2010 that figure stood at 96 and today, 103 countries have abolished capital punishment altogether. Six have done so for all offences except under special circumstances, and 50 have abolished it in practice because they have not used it for at least ten years or are under a moratorium.

The United Nations General Assembly resolutions provide an indication of the global trend towards the abolition of death penalty. The first resolution, in 2007, was adopted by a clear majority of 104 in favor. In the subsequent resolutions, support for abolition has increased while resistance has decreased. In the most recent vote, in 2012, 110 countries voted in favor, while only 39 voted against and 36 abstained.

Europe is almost death-penalty-free, while in the Americas only some Caribbean states and the United States use the death penalty. Even in the US, 16 States have abolished the death penalty. Of the 54 countries in Africa, 38 are abolitionist in law or in practice. Central Asia and the Pacific region are also virtually death-penalty-free.

West Asia, and South, South-east and East Asia are thus the “final frontier” for the abolition of the death penalty, with China being the largest executioner in the world. In South Asia, Nepal and Bhutan have already abolished the death penalty, while Sri Lanka and Maldives are abolitionist in practice. India stands with Afghanistan, Pakistan and Bangladesh in holding on to the death penalty.

3. Arguments for Capital Punishment

- **Retribution** - Supporters believe people who commit murder, have taken the life of another, have forfeited their own right to life. Furthermore, capital punishment is a just form of retribution, expressing and reinforcing the moral indignation of citizens.

- **Drain on public finances** - Maintaining a secure prison system for high-risk, violent offenders act as a drain on government resources.
• **Deterrence Effect** – It is claimed that it has a deterrent effect on potentially violent offenders for whom the threat of imprisonment is insufficient restraint.

• **Will of the citizens** - In many countries with capital punishment, a vast majority of citizens are in favor of retaining capital punishment. A survey held after the Delhi rape incident of Dec 2012, found that nearly 70% of Indians favored the continuance of capital punishment.

### 4. Arguments against Capital Punishment

• **Value of human life/Right to life** - Everyone has an inalienable human right to life as life is valuable, even of those who commit murder.

• **Execution of the innocent** - Innocent people get killed, because of mistakes or flaws in the justice system. There is evidence that such mistakes are possible: In the US, 130 people sentenced to death have been found innocent since 1973 and released from death row.
  - In 2012, 14 former judges of various High Courts and the Supreme Court of India signed an appeal to the President to pardon 13 convicts who had been erroneously sentenced to death (according to the Supreme Court’s own admission) and were facing the threat of imminent execution.

• **Retribution is wrong** - Many people believe that retribution is morally flawed and problematic in concept and practice as it is just a sanitized form of vengeance. Retribution via capital punishment legitimizes the very behavior that the law seeks to repress - killing. Hence, capital punishment is counterproductive in the moral message it conveys. Others argue that the retribution argument is flawed because the death penalty delivers a 'double punishment'; that of the execution and the preceding wait, and this is a mismatch to the crime. Death penalty is an inappropriate for a modern civilised society to respond to even the most dreadful crimes.

• **Failure to deter** - The death penalty doesn’t seem to deter people from committing serious violent crimes. The death penalty in India has little in relation to deterring or combating violent crime. As per the Home Ministry’s statistics, there has been no visible increase in the levels of ordinary crime and violence despite the reduction of executions in India. A survey conducted by the UN concluded: “research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment..The key to real and true deterrence is to increase the likelihood of detection, arrest and conviction.”

• **Expensive** - In countries with costly and lengthy appeals procedure like India, capital punishment becomes more expensive option than long-term imprisonment.

• **Applied unfairly** - Even in India, the application of the Bachan Singh guidelines has been arbitrary and as a whole the application of death penalty by individual judges remains fraught with arbitrariness, discrimination, caprice, and mistake.

• **Racial, ethnic and social class bias** – It is argued that it is used more often against perpetrators from racial and ethnic minorities and from lower socioeconomic backgrounds, than those coming from a privileged background.

• **Lawyers** - There’s also a concern that the legal system doesn’t always provide poor accused people with good lawyers.

### 5. Status in India and Constitutional/judicial position

In India there are **about 14 categories** of crimes that may bring death penalty for the accused like murder, assisting murder, terrorism, drug trafficking, inciting mutiny against state etc. Also, persons who are juveniles at the time of crime, pregnant women and mentally ill persons cannot be executed. Under **Bachan Singh v. State of Punjab**, SC held that advanced age may be a mitigating factor in sentencing, although it does not have the same exclusionary effect as the other three categories.

**The Appellate Process:** Those sentenced to death have the right to appeal both the sentence and the conviction. If a case was originally tried before a Court of Session, the defendant can appeal to a High Court, and if a case was originally tried before a High Court, then the defendant can appeal to the Supreme Court. The High Court is
the first appellate court for capital cases, except for certain terrorism-related cases where the Indian Supreme Court is the first court of appeal. The High Court can confirm a death sentence, commute the death sentence to another punishment, convict the defendant for another offense, order a new trial, or acquit the defendant. If a lower court does not impose a death sentence on an individual, the state can still appeal to the High Court to increase the penalty to a death sentence. There is no automatic right of appeal to the Supreme Court. However, in cases where the High Court increases a defendant’s sentence to the death penalty after a lower trial court acquitted the defendant, the case may be appealed to the Supreme Court.

In the military system, sentences passed by courts-martial under the Army, Navy, or Air Force cannot be appealed to a higher court.

**Pardoning Power of President and Governor:** Once the appeal process has been exhausted and the higher courts have confirmed the defendant’s death sentence, the defendant can submit petitions for mercy to the state or national executive. Under Article 72, the President of India can grant a pardon or reduce the sentence of a convicted person, particularly in cases involving capital punishment. A similar and parallel power vests in the Governors of each State under Article 161, however, he cannot pardon and abolve someone of the charges, which is exclusively done by President. Both the President and Governor are bound by the advice of their respective Councils of Ministers. Since, India has a unitary legal system all crimes are crimes against the Union of India. Therefore, a convention has developed that the Governor’s powers is exercised for only minor offenses, while requests for pardons and reprieves for major offenses and offenses committed in the UTs are deferred to the President.

The *pardoning power of the executive is subject to judicial review* and the Supreme Court has held that “it cannot be dispensed as a privilege or act of grace.”

**Curative petition:** The concept of Curative petition was evolved by SC in the matter of Rupa Ashok Hurra (2002) case where the question was whether an aggrieved person is entitled to any relief against the final judgment of the Supreme Court, after dismissal of a review petition. The Supreme Court in the said case held that in order to prevent abuse of its process and to cure gross miscarriage of justice, it may reconsider its judgment in exercise of its inherent powers.

**Important Supreme Court judgments related to Capital Punishment:**

- **Bachan Singh v. State of Punjab, 1980:** SC held that the death penalty was constitutional only when applied as an exceptional penalty in “the rarest of the rare” cases.
- **Kehar Singh v. Union of India, 1989:** Pardoning power of executive is subject to judicial review.
- **Bhagwan Das v. State, 2011:** SC ruled that the death penalty should be rendered as punishment in cases of “honour killings.” The Law Commission of India, however, disagreed with the ruling on the ground that the death penalty should be used “only in very exceptional and rare cases.”
- **Shatrughan Chauhan v. Union of India, 2014:** SC ruled that “undue, inordinate and unreasonable delay in execution of death sentence amounts to torture” and was a ground for commutation of sentence. The court also stated that the execution of people suffering from mental illness would be unconstitutional. The Court, observed that considerations such as the gravity of the crime, extraordinary cruelty involved or some disastrous consequences for society caused by the offence are irrelevant after the Constitution Bench decision in Bachan Singh’s case in 1980.
- **Devendra Pal Bhullar, 2014:** SC commuted death sentence of Devinder Pal Bhullar, a convict in 1993 Delhi bomb blast case to life imprisonment, both on the ground of unexplained/inordinate delay of 8 years in disposal of mercy petition and on the ground of insanity/mental illness/schizophrenia.

**6. Recent Trends and Issues**

- India has voted against UN General Assembly resolutions calling for moratorium/abolishment of death penalty on 4 occasions, the latest being in 2012.
- There were 1,303 capital-punishment verdicts between 2004 and 2013, according to this NCRB. In addition, 3,751 death sentences were commuted to life imprisonment during this period. However, the Supreme Court confirms barely 3 to 4 of these death sentences each year.
• From 1997 to 2007, just one mercy petition was decided by the executive. From 2007 till date, there has been a drastic change with more than 40 petitions being decided out of which more than 20 petitions were rejected.

• In recent times, India had three executions in quick succession of people convicted for terrorism-related offences: 2015 hanging of Yaqub Menon convicted of Mumbai Blasts in 1993, the 2013 hanging of Afzal Guru, convicted of plotting the 2001 attack on India’s Parliament, and the hanging of 2008 Mumbai attacks gunman Ajmal Kasab in 2012. Prior to these hangings, the last execution in India had taken place in 2004, when Dhananjay Chatterjee was executed by hanging for the murder and rape of a 14-year old girl. This, in turn, was the country’s first execution since 1995. The manner in which the executions of Kasab, Memon and Guru were carried out have been criticized. The executions of Kasab and Guru were carried out with unusual secrecy as neither the prisoner’s family nor the public were informed of the President’s decision to deny clemency until after the execution had been carried out, which runs counter to prior government practice. After mercy petitions are rejected by the President, the prisoner and the petitioners are supposed to be informed of the decision and the prisoner and his relatives are to be notified of the execution date. Such policies ensure that the prisoner and relatives are able to exhaust all available judicial remedies to further stay or commute a pending execution.

• In the wake of the debate over the death penalty following the execution of Mumbai attack convict Yakub Memon, the Supreme Court has said capital punishment is not inhuman or barbaric and will not violate the right to life and liberty in heinous crimes.

• Germany has expressed its inability to sign the Mutual Legal Assistance Treaty (MLAT) with India, citing its provision for “death penalty” for heinous crimes and terror activities.

Criticism of the “rarest of rare” doctrine: A Supreme Court judgment stipulates that capital punishment will be imposed in “the rarest of rare” cases, where the community’s “collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty” because of the abhorrent nature of the crime, which would include “the manner of the commission of the murder,” for instance, “if it was committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner,” or where the victim was “subjected to inhuman acts of torture or cruelty in order to bring about his or her death.”

Issues with this judgement:

• What a judge takes as the collective conscience of the community is often the slant carried by the media. It is often the middle class, by whose standards crimes are judged.

• What is the community whose conscience the judge must tap into and channel into a pronouncement of death.

• Public opinion is manipulated with modern technology, the outrage which the judiciary will interpret as an indignation that must be quenched with blood can be provoked by the technically adept or those with the money to influence the media.

• If a man is to be hanged because the judge feels that the collective conscience is so shocked that it will expect him to inflict the death penalty, can a trial be fair, with the accused presumed to be innocent until he is proven guilty? If, before the trial starts, society has already made up its mind, in the judge’s view, that it will only be satisfied with the death penalty, it has also determined who the guilty are.

This ambiguity has led to liberal interpretation of the doctrine and there have been significant awards of capital punishment in recent times.

7. Suggestions and way forward

Law Commission in its 262nd report submitted recently recommended the abolition of capital punishment for all crimes in India, except the crime of waging war against the nation or for terrorism-related offences. It cited several factors to justify abolishing the death penalty, including its abolition by 140 other nations, its arbitrary and flawed application and its lack of any proven deterring effect on criminals.
Internationally this practice has been discarded by majority of the nations today. As a leader of human rights and emerging nations, it does not set a right example. India has been criticized internationally in handling its insurgency in North east and Kashmir. Abolishing capital punishment will augur well for us internationally.

However, as Law Commission said that it is the not right time of abolition experiment, the issue needs to be debated and researched in more detail. But, capital punishment should not become a pent-up of society’s misplaced anger and sense of judgment. It is also against the reformative purpose of the Criminal Justice System and we must remember the words of Oscar Wilde, “Every saint has a past and every sinner a future.”